No. 5736

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ARVID PEARSON and A. J. HENNESSY,
Appellants,

vs.

A. W. HIGGINS, as Trustee in Bankruptcy of Louis Morgan (a bankrupt),
Appellee.

BRIEF FOR APPELLANTS.

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I.

STATEMENT OF CASE.

This is an appeal from an order and decree of the Southern Division of the United States District Court, Northern District of California, Honorable Harold Louderback, Judge, confirming the report of a referee in bankruptcy of one Louis Morgan, a bankrupt, and denying a petition for review of the order of the said referee made in *summary proceedings* instituted by the appellee as trustee of the bankrupt, said order directing appellants to deliver possession of the boat "Saxon" to him as such trustee, and this despite their *bona fide* and very substantial claim of title to the boat, adverse to the bankrupt and the trustee, and

despite the fact that the boat is in *custodia legis* of the Superior Court of the State of California, in and for the City and County of San Francisco, and despite the fact that it was established before the referee, without conflict of evidence and before the United States District Court, without conflict of evidence, that the boat is partnership property of the bankrupt and appellant Pearson, and as such expressly excluded from the bankruptcy proceedings by the concluding clause in Section 5 of the Bankruptcy Act of 1898, the partnership not being involved in nor a party to the bankruptcy proceedings and never as a partnership, having been adjudged bankrupt, but the petition in bankruptcy and the adjudication in bankruptcy being restricted to Morgan individually and not extending to or including the partnership (R. 9, 11, 12, 13, 14, 15, 21 to 27, 30), and the appellant, the copartner Pearson, never having consented that any of the partnership property be administered in the bankruptcy Court. (R. 15.)

The *summary proceedings* before the referee were instituted by the appellee as trustee in bankruptcy of Morgan, by petition on October 24, 1928 (R. 2), setting forth the *custodia legis* of the boat by the state Court, *on the adverse claim of Pearson, but not alleging his claim to be merely colorable,* and alleging the filing of Morgan's voluntary petition in bankruptcy on June 19, 1928, and the adjudication upon it the same day. There is no averment nor contention that application was made by the trustee to the state Court for possession of the boat and the fact is that no such application was ever presented. This also is conclu-

sive against the trustee's petition, as held in *Carling v. Seymour Lumber Co.,* 113 F. 485, 491. In the *summary proceedings* an order was issued to the appellant Pearson and his attorney the appellant Hennessy, by the referee, requiring them to show cause why they "should not immediately turn over and deliver to the said A. W. Higgins, trustee herein, the possession of the boat 'Saxon'." (R. 6.) To these proceedings before the referee the appellants Pearson and Hennessy interposed and filed their *sworn* plea to the jurisdiction (R. 7), stating therein that they specially appeared for the purpose of making the plea, that the order to show cause had not been served on Pearson, that he was absent from the State of California, that the boat was in *custodia legis* of the state Court, that it never had been in the custody or possession of Hennessy, that the trustee was a party to the action in the state Court and was there litigating on its merits the alleged claim to the boat as made by him in his capacity of such trustee, that he had submitted himself as trustee to the jurisdiction of the state Court, that he never applied to the state Court for possession of the boat, that the boat is partnership property and as such not subject to the jurisdiction of the United States District Court or its referee in the bankruptcy proceedings of Morgan, that appellant Pearson is not insolvent and has never been adjudged bankrupt, that the partnership has never been adjudged bankrupt, that under the concluding clause in Section 5 of the Bankruptcy Act of 1898, the appellant Pearson, as a copartner of Morgan is entitled to the possession of the boat as against the trustee in bankruptcy, and

that Pearson has not consented and does not consent to the boat being administered in the bankruptcy proceedings. *There was no answer filed to the plea* and therefore as held by all the authorities on the point, some of them hereinafter cited, its averments are to be taken as true. The referee overruled the plea (R. 21) and ordered appellants to deliver the boat to the appellee as trustee in bankruptcy. Thereupon and within three days after the order was made (R. 22, 28, 29), the appellants proceeding under Rule 9 of the rules in bankruptcy of the District Court and General Order XXVII of the general orders in bankruptcy, filed in the District Court, their *sworn* petition for review of the order and proceedings of the referee and in the petition set forth the facts relative to the plea to the jurisdiction and the proceedings thereon; also alleged the referee's said order, and that the boat in partnership property, and in *custodia legis* of the state Court, and that there existed no jurisdiction in the bankruptcy proceedings, for the following enumerated reasons, to wit: (1) that no service of the referee's order to show cause had been made on Pearson. (2) That Pearson's claim to the boat is adverse to the trustee in bankruptcy and was not alleged nor shown to be merely colorable or without right, in the summary proceedings before the referee. (3) That the boat is partnership property and therefore not subject to the jurisdiction in bankruptcy of Morgan individually. (4) That the boat is not in the custody or possession of appellants, but is in *custodia legis* of the state Court. (5) That no application was ever made to the state Court by the

trustee, for possession of the boat. (6) That Section 5 of the Bankruptcy Act of 1898 denies to the United States District Court and its referee, all jurisdiction over the boat, it being partnership property. (7) That the said United States District Court and its referee have no jurisdiction or authority in *summary proceedings* to pass upon or determine on its merits the said adverse claim of Pearson to the exclusive possession of the boat as partnership property. (8) That the bankruptcy statute denies said Court and its referee the authority and jurisdiction to take possession of the boat from Pearson as said copartner of Morgan. (9) That the statute denies the trustee all right to the possession of the boat. (10) That the trustee's petition to the referee for possession of the boat is insufficient in law to justify or sustain *summary proceedings* before the District Court or its referee for possession of the boat. (11) That neither the trustee's petition or the evidence before the referee shows or tends to show that the claim of Pearson to the boat is merely colorable and not adverse. (12) That ever since the 19th day of August, 1927, the boat has been and is the property and an asset of the partnership of appellant Pearson and the bankrupt Morgan and in the possession of the partnership until delivered by process of law *pendente lite*, into the custody of Pearson as solvent partner of Morgan and as property of the partnership. It is also averred in the *sworn* petition for review that appellant Hennessy is not and never has been attorney in fact of Pearson and has never held and does not hold possession of the boat. *No answer was ever filed to the sworn petition*

for review (R. 1, 2, 48), and therefore its averments are to be taken as true, as held by the authorities hereinafter cited on the point.

The questions presented by appellants in support of their appeal are sufficiently indicated in the foregoing statement of the case. *The referee expressly states that he makes no ruling as to whether the boat is partnership property or not and expressly concedes that if it is partnership property, he has no jurisdiction to make the order* (R. 18, 19, 20, 32, 33, 37); he bases his decision and order entirely upon the plainly erroneous and untenable ground that when the boat was released from levy by the sheriff upon execution issuing out of the state Court in the case of *Pulin v. Morgan,* it at once *ipso facto* came within the custody and possession of the bankruptcy Court by operation of law (R. 30, 32, 33, 34, 35, 37), although at the time Morgan filed his petition in bankruptcy and at the time he was adjudged a bankrupt, he did not have possession or custody or control of the boat, but it was then and thereafter in *custodia legis,* having been prior to the filing of Morgan's petition in bankruptcy, levied upon and seized by the sheriff upon said execution. (R. 30, 32, 34.)

II.

SPECIFICATION OF ERRORS.

1. The referee and the District Court erred in overruling the plea to the jurisdiction.

2. The referee and the District Court erred in ordering appellants to deliver possession of the boat "Saxon" to the trustee in bankruptcy.

3. The referee and the District Court erred in ruling and deciding that they had competent jurisdiction in bankruptcy to make said order requiring appellants to deliver possession of said boat "Saxon" to the trustee in bankruptcy.

4. The referee and District Court erred in ruling and deciding that in *summary proceedings* they had competent jurisdiction to make said order requiring appellants to deliver possession of said boat to the trustee in bankruptcy.

5. The referee and the District Court erred in ruling and deciding that said boat came into the custody and possession of the bankruptcy Court subsequent to the adjudication in bankruptcy as to the bankrupt Louis Morgan and as against the appellants.

6. That the said order of the said District Court and its referee requiring appellants to deliver possession of said boat "Saxon" to the trustee in bankruptcy of said Morgan, is void for want of jurisdiction over the appellant Pearson, he never having been served with the order to show cause, and also void for want of jurisdiction over the subject matter, the boat being partnership property, and not the individual property in severalty of the bankrupt Morgan, and not being in his custody, control or possession at the time of the adjudication in bankruptcy nor at the time he filed his petition in bankruptcy.

7. That the District Court erred in confirming the report of the referee.

8. That the District Court erred in denying the petition for review filed therein by appellants and in refusing to reverse, annul and set aside said order of the referee requiring appellants to deliver possession of said boat to the trustee in bankruptcy.

9. That said order of the referee and of the District Court made in summary proceedings and requiring appellants to deliver possession of said boat to the trustee in bankruptcy, operates to deprive said appellant Pearson of his property without due process of law and is therefore in violation of the Fifth Amendment of the Constitution of the United States.

10. That the said order of the referee and of the District Court requiring appellants to deliver possession of said boat to the trustee in bankruptcy, is in violation of the concluding clause in Section 5 of the Bankruptcy Act of 1898, excluding partnership property from the jurisdiction of the bankruptcy Court where the petition and adjudication relate only to one of the partners individually, and do not extend to nor include the partnership, and there is no consent by the solvent partner to have any of the partnership property administered in the bankruptcy proceedings.

These specifications of error are sustained by the assignments in the record. (R. 41 to 45.)

III.

BRIEF OF ARGUMENT.

1. VALID APPEAL.

The case is properly appealed to the United States Circuit Court of Appeals, under Section 24a of the Bankruptcy Act as amended May 28, 1926. (44 Stat. 662.)

Taylor v. Voss, 271 U. S. 180, 181, 183; 46 S. C. Rep. 461, 463, 464, 465;
Harrison v. Chamberlin, 271 U. S. 191, 193;
Gibbons v. Goldsmith, 222 F. 826, 828;
Clark v. Huckaby, 28 F. (2d) 154, 156, 157.

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2. NO JURISDICTION TO MAKE ORDER FOR DELIVERY OF BOAT TO TRUSTEE.

That the boat "Saxon" is *partnership property* of the bankrupt Morgan and the appellant Pearson, is distinctly alleged in the *sworn* plea to the jurisdiction and in the *sworn* petition for review (R. 8, 14, 15, 23, 24, 26), and not controverted by answer. This in law requires the Court to consider the boat, partnership property, in these proceedings.

Matter of Benson & Kinsler, 25 F. (2d) 756;
Matter of Western Rope & Mfg. Co., 298 F. 926;
Matter of Goldstein, 216 F. 887, 888;
Matter of Blum, 202 F. 883;
Matter of Farmers & M. Bank, 190 F. 726, 728;
Cooney v. Collins, 176 F. 189, 192, 193;
Matter of Kane, 131 F. 386, 387;

Remington on Bankruptcy (3d Ed.) Sec. 2436 at pages 586, 587; Sec. 2438 at page 582; Sec. 2439 at page 588; Sec. 2440 at page 589. Also Sections 3655 and 3657.

This being the well settled law on the point and it being therefore established by the record that the boat is partnership property, it results that the District Court and its referee had no jurisdiction over it in the bankruptcy proceedings as based on the voluntary petition in bankruptcy, of Morgan individually. This is clearly the legal effect of the concluding clause in section 5 of the Bankruptcy Act of 1898, denying and excluding the jurisdiction. The law is so stated in:

In re Mercur, 122 F. 384, 387, 388;

In re Bertenshaw, 157 F. 363, 367, to 373;

Meek v. Centre County Banking Co., 268 U. S. 426, 431, 432, 433, 434; 45 S. C. Rep. 560, 562, 563;

Williams v. Lane, 158 Cal. 39, 43, 44, 45;

4 Cal. Jur., Sec. 20, p. 69;

7 Corpus Jur. 132;

Collier on Bankruptcy, (13th Ed.) 233, 236;

Remington on Bankruptcy, (3d Ed.) Secs. 2906, 2909, 2910.

Therefore as the District Court and its referee had no jurisdiction over the boat "Saxon," *it being partnership property,* the order requiring appellants to deliver possession of the boat to Morgan's trustee in bankruptcy, is clearly void, and the decision and decree of the District Court refusing to annul and quash it on the petition for review is clearly reversible error.

3. CUSTODIA LEGIS OF STATE COURT.

In the next place, the state Court having competent jurisdiction in the claim and delivery action there pending, to determine the right to the possession of the boat as to all the parties in the litigation, including the trustee in bankruptcy of Morgan, and the boat being *in custodia legis,* the bankruptcy Court had no jurisdiction for this reason also, to order that the appellants deliver possession of the boat to the trustee, or in any other respect interfere with or disturb the state Court's custody of it. The record shows clearly that the boat is *in custodia legis* of the state Court. (R. 2, 3, 7 to 14, 23, 24, 30, 31.) The record also shows that on the 19th day of June, 1928, Morgan filed his voluntary petition in bankruptcy, and that on the basis of it, he was adjudged bankrupt the same day. (R. 3, 30.) Six days *previously* to the filing of the petition and the making of the adjudication in bankruptcy, the state Court by its officer, the sheriff of the City and County of San Francisco acquired custody and possession of the boat, upon a levy of a writ of execution issued out of and by the Court on a judgment rendered and entered therein in the action there pending and entitled "Joseph Pulin, plaintiff v. Louis Morgan, defendant." (R. 30.) *Therefore the boat never went into the custody actual or constructive of the bankruptcy Court,* it not being in the custody, possession or control of the bankrupt when he filed his petition, nor when he was adjudged bankrupt.

Liberty Nat. Bank v. Bear, 265 U. S. 365, 368 to 371; 44 S. C. Rep. 499, 500, 501;

Taubel v. Fox, 264 U. S. 426, 430 to 434, 438; 44 S. C. Rep. 396, 398, 399, 401.

The referee expressly concedes that when Morgan's petition in bankruptcy was filed and when he was adjudged a bankrupt, the boat was in possession of the state Court. (R. 34.)

It is true that subsequently to the adjudication in bankruptcy the sheriff released the levy, ostensibly because of it, but he had no right to do so and acted in excess of his authority. However the fact remains that as the boat did not go into the custody or possession, either actual or constructive, of the bankruptcy Court at the time of the filing of Morgan's petition, nor at the time of the adjudication; *it not being then in the possession or custody of the bankrupt*, it never went into the Court's custody or possession by virtue of the bankruptcy jurisdiction, however much the trustee might have the right thereafter to bring plenary suit in the state Court to recover it as being property of the bankrupt, and thereby if successful bring it into his custody as trustee for administration in the bankruptcy proceedings. For would it be legally possible for the boat to go into the custody of the bankruptcy Court, it being *partnership* property.

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4. SUMMARY PROCEEDINGS VOID.

Clearly there could be no valid *summary proceedings* before the referee in bankruptcy to get possession of the boat as against the adverse claim of Pearson that it was partnership property and as such

not subject to the bankruptcy jurisdiction restricted as it is, to Morgan individually. A plenary suit by the trustee and brought by him in the state Court, would be necessary to get possession of the boat. (Bankruptcy Act, Sec. 23.) This is the well settled law on the point:

Harrison v. Chamberlin, 271 U. S. 191, 193;
Taubel v. Fox, 264 U. S. 426, 430 to 434, 438; 44 S. C. Rep. 396, 398, 399, 401;
Babbitt v. Dutcher, 216 U. S. 102, 105, 113;
Bardes v. Hawarden Bank, 178 U. S. 524, 532, 537, 538;
Mitchell v. McClure, 178 U. S. 539;
Louisville Trust Co. v. Cominger, 184 U. S. 18;
Jaquith v. Rowley, 188 U. S. 620;
First Nat. Bank v. Chicago T. & T. Co., 198 U. S., 280, 289;
Galbraith v. Vallely, 256 U. S. 46, 49, 50;
May v. Henderson, 268 U. S. 111, 115;
Eyster v. Gaff, 91 U. S. 525, 526;
In re Berland, 8 F. (2d) 724;
Redmon v. Vitt, 9 F. (2d) 36, 37;
Matter of Kumey, 289 F. 242, 244;
Copeland v. Martin, 182 F. 805;
In re Bertenshaw, 157 F. 363, 367 to 373;
In re Wells, 114 F. 222;
Tennyson v. Beggs, 176 Cal. 255, 258;
Fidelity S. & L. Assn. v. Citizen's T. & S. Bank, 186 Cal. 689, 692, 696;
4 Cal. Jur., Sec. 20, p. 69;
Spears v. Frenchton & B. R. Co., 213 F. 784, 786;

Shea v. Lewis, 200 F. 877;
In re Baird, 116 F. 765;
In re N. Y. Car Wheel Wks., 132 F. 203;
Cooney v. Collins, 176 F. 189, 192, 193.

Nor is it alleged in the petition of the trustee (R. 2, 3, 4), nor decided by the referee, that appellant Pearson's adverse claim respecting the boat being partnership property, is merely colorable; and therefore the law requires that the claim be held real, substantial, *bona fide* and not simply colorable.

Matter of Scherber, 131 F. 121;
Spears v. Frenchton & B. R. Co., 213 F. 784, 786;
Remington on Bankruptcy, (3d Ed.), Sec. 2438, at pages 582, 585.

Being such, there can be no valid summary proceedings respecting it, as held by the many authorities above cited.

Say the Supreme Court:

> "It is well settled that property or money held adversely to the bankrupt can only be recovered in a plenary suit and not by a summary proceeding in a bankruptcy court."

May v. Henderson, 268 U. S. 111, 115; 45 S. C. Rep. 456, 458;
Harrison v. Chamberlin, 271 U. S. 191, 193.

It results that the summary proceedings before the referee, and his order requiring appellants to deliver possession of the boat to the trustee, are void for want of jurisdiction. The plainly erroneous view of the referee as stated at page 36 of the record that the

"right to plenary suit exists only where the adverse claimant was in possession before the bankruptcy and remains in possession," is conclusively answered and refuted by the authorities above cited, holding that if his possession, no matter when acquired, is based upon a *bona fide, real and substantial and not merely colorable claim of right,* adversely to the bankrupt, he, the claimant, cannot be dispossessed in summary proceedings, if at the time of the filing of the petition in bankruptcy and at the time of the adjudication, the property was not in the possession of the bankrupt and therefore not in the constructive custody of the bankruptcy Court, or if as in the instant case, the property *as partnership property* could not be in the constructive custody of the Court. Nor is all property in the bankrupt's possession at the time of the filing of his petition in bankruptcy, subject to the jurisdiction of the bankruptcy Court, irrespective of whether the property belongs to and is owned by the bankrupt or not. The jurisdiction is statutory and special and restricted to the property of the bankrupt and extends no farther.

The question of title as against the bankrupt must be determined by the state Court in a plenary suit by the trustee, if the property is in the possession of an adverse claimant who asserts a legal right to it, not merely colorable, but one that is real and substantial and *bona fide,* especially in a case where the property has never come into possession, actual or constructive, of the bankruptcy Court. It could not come into such possession of the Court if it was not in the bankrupt's possession at the time he filed his petition,

nor at the time he was adjudged bankrupt, but was then in *custodia legis* of the State Court, on levy of its writ of execution. (*Liberty Nat. Bank v. Bear,* 265 U. S. 365, 368 to 371), nor if it is partnership property. It would make no difference that *afterwards* the bankrupt obtained possession of the property. If he did his possession would only be that of a copartner. This would not give the bankruptcy Court a constructive possession of the partnership property, and therein lies the fallacy of the contention of the referee (R. 37), that on release of the boat by the sheriff at a time subsequent to the adjudication in bankruptcy, the property at once went into the constructive custody of the bankruptcy Court, by operation of law. It did not and could not, as it was not in the bankrupt's possession when he filed his petition for the adjudication nor when the adjudication was made. *Nor is it possible to perceive how partnership property the statute plainly says is not subject to the bankruptcy Court's jurisdiction, can go into its custody by virtue of that jurisdiction.* The question whether it is partnership property, is not a *federal* question, but is one strictly for the State Court to determine in a plenary suit by the trustee, where the property is in possession of the adverse claimant, who as a solvent partner is asserting his legal right to retain its possession as against the bankruptcy proceedings of his insolvent copartner. *The solvent partner cannot lawfully be required to surrender his possession to the trustee, before it has been judicially determined by a Court of competent jurisdiction, that the property is not partnership property.* To deprive him of the possession by

order of a referee in summary proceedings, and at the same time do so without any decision that the property belongs to the bankrupt in severalty and is not partnership property, is clearly to deprive the adverse claimant of his legal right to the property, without "due process of law," and in violation of the Fifth Amendment of the Constitution.

Marshall v. Knox, 16 Wall. 551, 555, 556, 557;
Smith v. Mason, 14 Wall. 419, 431, 433;
Havemeyer v. Superior Court, 84 Cal. 327, 396, 397, 400, 401;
Stuparich v. Superior Court, 123 Cal. 290, 292.

Of course the referee would have no jurisdiction to determine whether the property is partnership property or not, *(Spears v. Frenchton etc. R. R. Co.,* 215 F. 784, 786; *Shea v. Lewis,* 200 F. 877; *In re Baird,* 116 F. 765; *In re Wells,* 114 F. 222; *Remington on Bankruptcy,* 3d ed., sec. 2437), and has not attempted to do so, but on the contrary has properly refused to pass upon the matter. (R. 32, 33.) His basic error is in the palpably untenable notion that the bankruptcy jurisdiction extends to all property simply because it is claimed by either the bankrupt or the trustee, and irrespective of whether it is the bankrupt's individual property or not or belongs to a partnership, and irrespective of whether it was in the possession of the bankrupt either at the time he filed his voluntary petition in bankruptcy, or at the time of the adjudication based upon it. In this the referee's view of the law (R. 32, 33), he is clearly in error.

Eyster v. Gaff, 91 U. S. 525, 526;

Bardes v. Hawarden Bank, 178 U. S. 524, 537, 538,

and the many other authorities herein cited.

In his report (R. 29, 30), the referee refers to the fact that the bankrupt has scheduled an "interest" in the boat, (not specifying the nature or extent or value of the interest, but only the alleged value of the boat), and the referee refers to this as a material fact on which he bases his order; but it is clearly of no importance whatever and not in the slightest degree relevant here, as rightly held in *Eames v. Philpot,* 72 Cal. App. 158.

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5. THE CUSTODIA LEGIS OF THE STATE COURT IN THE ACTION OF CLAIM AND DELIVERY.

After the release of the boat by the sheriff, and subsequent to the adjudication in bankruptcy, the bankrupt Morgan took possession of it, whereupon the appellant Pearson as solvent partner brought an action in the state Court in claim and delivery, against Morgan, to recover the property. Pending the action, the state Court by its officer, the sheriff, seized the boat and held it in temporary custody under the provisions of sections 509, 510, 511 and 512 of the Code of Civil Procedure of California (R. 2, 3, 7, to 12, 23, 24); thereafter and pursuant to section 514 of said Code, expressly providing that the defendant in the action may require the return of the property to him, pending the trial of the case,

> "by giving the sheriff a written undertaking, executed by two or more sufficient sureties to the

> effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for payment to him of such sum as may, for any cause, be recovered against the defendant. If a return of the property be not so required within five days after the taking and service of notice to the defendant, it must be delivered to the plaintiff,"

the sheriff rightly and on the expiration of the five days, there being no reclamation bond by the defendant, delivered the property to the plaintiff, the appellant Pearson, who still holds it in his possession *pendente lite*. Contrary to the clearly erroneous views of the referee on the point (R. 17, 18), such possession by Pearson is the custody and possession of the state Court, and is held to be a possession *in custodia legis,* and one the Court is expressly required to protect from interference, the statute expressly providing that

> "after the property has been delivered to the plaintiff as in this chapter provided, the Court shall, by appropriate order, protect the plaintiff in possession of said property until the final determination of the action."
>
> Cal. Code Civ. Proc., Sec. 521.

The action is still pending and awaiting trial in due course. That the possession of the boat by Pearson is the possession of the State Court and constitutes a *custodia legis*, in the State Court, is distinctly held in:

> Hagan v. Lewis, 10 Pet. 400;
>
> Hawi M. & P. Co. v. Leland, 56 Cal. App. 224;
>
> Bisconer v. Billing, 71 Cal. App. 779.

This absolutely valid *custodia legis* of the state Court, of course, precludes all interference with it by the bankruptcy Court.

Palmer v. Texas, 212 U. S. 118.

And while it is perfectly true, as held in *White v. Schloerb,* 178 U. S. 542, the property could not be taken from the custody of the bankruptcy Court by writ of replevin issuing out of the state Court, *we have no such case here,* as the boat in the instant case was not in the custody, either actual or constructive, of the bankruptcy Court at the time of the filing of Morgan's voluntary petition in bankruptcy, nor at the time of the adjudication based on the petition, but was then, as sufficiently hereinbefore shown, in custody of the state Court upon its writ of execution in the case of *Pulin v. Morgan.* But it is in any event conclusive that the boat as partnership property, could not be in the custody of the bankruptcy Court on the individual petition of Morgan, restricted as it is to him and not embracing nor extending to the partnership. In such a case, jurisdiction over the boat as partnership property is prohibited by the concluding clause in section five of the Bankruptcy Act of 1898.

In re Mercur, 122 F. 384;
In re Bertenshaw, 157 F. 363, 367 to 373;
Williams v. Lane, 158 Cal. 39, 43 to 45;
Remington on Bankruptcy, (3d Ed.) Secs. 2906, 2909, 2910;
7 Corpus Juris., 132;
4 Cal. Jur., Sec. 20, page 69.

There is nothing to the contrary in *White v. Schloerb,* 178 U. S. 542, as explained in *Metcalf v. Barker,* 187 U. S. 165, 176, and *Hinds v. Moore,* 134 F. 221, 223, 224.

And of course and in conflict with the erroneous views of the referee on the point (R. 34), the decision and judgment of the state Court in the action of claim and delivery, that the boat is partnership property, will be *res judicata* on the bankruptcy Court; it is so held in:

Herman v. Cullerton, 13 F. (2d) 754, 755, 756;
Lion B. & S. Co. v. Karatz, 262 U. S. 77;
Shields v. Coleman, 157 U. S. 168.

It is undoubtedly the law that the boat being *in custodia legis* of the state Court in the action of claim and delivery, and never having been in the possession or custody, actual or constructive, of the bankruptcy Court, it not having been in the bankrupt's possession when he filed his voluntary and individual petition in bankruptcy, nor when on the same day he was adjudged a bankrupt, the referee's order is void; and it being clear from the statute that the boat as partnership property is excluded from the jurisdiction of the bankruptcy Court and its referee, the order of the latter in the summary proceedings before him, attempting to take the boat from the custody of the state Court and deliver it to the trustee in bankruptcy and in a case where the jurisdiction to determine whether the boat is partnership property is exclusively in the state Court, and where its decision and judgment that the boat is partnership property will be

res judicata on the bankruptcy Court, is plainly a violation of the state Court's competent jurisdiction in the case and for that reason unlawful. It is not the law that the bankruptcy Court has exclusive jurisdiction to determine whether the boat is partnership property or not, and the views of the referee to the contrary, (R. 33, 34), are clearly erroneous. The jurisdiction to determine the question is exclusively in the state Court and not in the bankruptcy Court. This is held to be the well settled law upon the point by the many authorities we have herein cited under Section 23 of the Bankruptcy Act of 1898. As said by the Supreme Court in *Lion B. & S. Co. v. Karatz,* 262 U. S. 77, "lower federal Courts are not superior to the state Courts." And again we point out that to require the appellants to deliver possession of the boat to the trustee in bankruptcy, before any judicial determination is made that the boat is the individual property of the bankrupt Morgan, with title in him in severalty, and not partnership property, is clearly to deny them the "due process of law" guaranteed by the Fifth Amendment of the Constitution, which applies as much to the possession of property as it does to its title, as held in *Marshall v. Knox,* 16 Wall. 551, 557, and *Havemeyer v. Superior Court,* 84 Cal. 327, 396, 397, 400, 401.

It is plainly a violation of the constitutional right to "due process of law," to take from a man the possession of property to which he is entitled and without a hearing or opportunity to be heard, nor any decision respecting his legal right to its possession,

compel him to bring action for its recovery, or otherwise establish his legal right to the property.

It is so held in:

Marshall v. Knox, 16 Wall. 551, 557;

Havemeyer v. Superior Court, 84 Cal. 327, 396, 397, 400, 401.

Possession is what gives at least some value to the title, and to deprive him of the possession is to deprive him of the property and when done or attempted as in the instant case, without first giving him his "day in court" as to his legal right to retain the possession, is to deny him the constitutional guaranty of "due process of law."

Smith v. Mason, 14 Wall. 419, 431, 433;

Marshall v. Knox, 16 Wall. 551, 555, 556, 557;

Havemeyer v. Superior Court, 84 Cal. 327, 396, 397, 400, 401;

Stuparich v. Superior Court, 123 Cal. 290, 292;

Thompson v. Superior Court, 119 Cal. 538, 543, 544.

In the referee's report it is expressly conceded that there is no jurisdiction in the bankruptcy court to order delivery of the boat to the appellee as trustee, *if it is partnership property* (R. 18, 19, 33, 37); and yet without any hearing or decision as to whether the boat is partnership property or not, the referee orders the appellant Pearson, who as solvent partner, has the legal right to its possession as partnership property, to deliver it to the trustee in bankruptcy, on the *assumed* but not adjudged theory that it is the property of the bankrupt and not the property of the part-

nership. Clearly no such order is valid until it is first decided by a Court of competent jurisdiction that the boat is not partnership property, and is the property of the bankrupt individually. And clearly too the referee is in error in ruling that the boat was in the constructive custody and possession of the bankruptcy Court, when as clearly shown by the record (R. 30, 34), it was in the custody and possession of the state Court by virtue of the levy of its writ of execution in the case of *Pulin v. Morgan,* at the very time that Morgan filed his petition in bankruptcy and at the very time he was adjudged a bankrupt. As a matter of well settled law the bankruptcy Court could not *thereafter* get actual or constructive possession of the boat upon the release of the levy the sheriff had made, as the Court's jurisdiction is not only limited to the benkrupt's individual property, but the constructive custody and possession of it as resulting from the filing of the petition, is also limited to the property then in the bankrupt's actual possession, and does not extend to property that subsequently to the adjudication comes into his possession, especially when such possession is that of a partner and not individually, and the petition in bankruptcy is his individual petition and does not extend to the partnership nor to the partnership property. We are not contending that the mere assertion the property is partnership property, is sufficient to exclude the jurisdiction of the bankruptcy Court, but the point we make is that the adverse claim to it as partnership property, coupled with its possession, is sufficient to prevent summary proceedings against it

in the bankruptcy Court, and entitled the claimant to retain the possession as against the trustee and the bankruptcy jurisdiction, until in a plenary suit in the state Court it is finally adjudged that the property is not partnership property, but is the individual property of the bankrupt. The authorities herein cited fully sustain this contention, and it certainly is conclusive against the plainly untenable theory of the referee that when subsequently to the adjudication in bankruptcy, Morgan obtained possession of the boat, such possession became the possession and the constructive custody of the bankruptcy Court. It certainly did not, and for the obvious reason that the boat was not in Morgan's possession when he filed the petition in bankruptcy nor when he was adjudged a bankrupt, but was in *custodia legis* in the state Court; and the fact that afterwards the boat came into the possession of Morgan would not put it into the possession nor in the constructive custody of the bankruptcy Court as against the adverse claim of the appellant Pearson that it is partnership property and therefore not subject to the Court's jurisdiction in the bankruptcy proceedings restricted as they are to Morgan individually. The theory of the referee that immediately on the boat being released from the levy of the writ of execution issuing out of the state Court, it at once and by operation of law went into the constructive custody of the bankruptcy Court (R. 18, 32, 33, 37), is clearly an impossible one, not only because the boat was not in the bankrupt's possession when he filed his voluntary petition in bankruptcy, nor when he was adjudged a bankrupt, but being

partnership property and adversely claimed as such by the appellant Pearson, it could not and did not go into the constructive possession of the bankruptcy Court, and therefore and according to the authorities we have cited, the *summary proceedings* before the referee are clearly void. In addition, we cite as sustaining our contention:

Boyle v. Gray, 28 F. (2d) 7, 15, 16;
In re Macklem, 28 F. (2d) 417, 419.

The precise question presented in this respect is not whether an adjudication adverse to the claim that the boat is partnership property, can be made by the bankruptcy Court or its referee in summary proceedings, for no such adjudication has been made or attempted, but it is whether the Court in summary proceedings and without deciding whether the boat is partnership property or not, can order its delivery to the trustee, by the solvent partner who is making a substantial and *bona fide* claim, adverse to the trustee that the boat is partnership property and therefore excluded by the concluding clause in Section 5 of the Bankruptcy Act, from the Court's jurisdiction. Of course the Court can have no lawful custody or possession either actual or constructive of the boat if it is partnership property—a conclusive point expressly conceded by the referee (R. 18, 33, 37). So that the case in this particular must and does depend on the judicial determination by a Court of competent jurisdiction, of the dominant and paramount question whether the boat is partnership property.

According to the authorities we have herein cited on the point, the only Court of competent jurisdiction to decide the question is the state Court in a plenary suit and the decision will be *res judicata* on the bankruptcy Court. As the bankruptcy statute in the concluding clause of Section 5 denies the latter Court all jurisdiction of the boat if it is partnership property, and as the Court can have no possession actual or constructive of the boat in such a case, it can have no jurisdiction in summary proceedings to determine the question, unless of course the claim that the boat is partnership property is shown to be merely colorable and not substantial or *bona fide*, neither of which conditions exists in the instant case. It is neither alleged in the petition of the trustee for the order directing the delivery of the boat to him, nor does the referee find or decide that the claim is merely colorable. Therefore the law deems the claim to be real, substantial, *bona fide* and not merely colorable.

Matter of Scherber, 131 F. 121;

Spears v. Frenchton & B. R. Co., 213 F. 784, 786;

Remington on Bankruptcy, (3d Ed.), Sec. 2438, at pages 582, 585.

Therefore the Court in bankruptcy has no jurisdiction in a summary proceeding to decide the controversy as to whether the boat is partnership property, and has not attempted to do so in the instant case. The basic theory advanced by the referee, that the boat was in the constructive custody

of the bankruptcy Court is entirely unfounded, not only because at the time of the filing of Morgan's petition in bankruptcy and when the adjudication in bankruptcy was made, the boat was then actually in the *custodia legis* of the State Court by its sheriff under levy of its writ of execution in *Pulin v. Morgan,* but the boat as partnership property could not by any legal possibility be in the constructive possession of the bankruptcy Court in the Morgan bankruptcy case. Therefore the boat could not be judicially before the Court, nor in its custody as a basis for the exercise of a jurisdiction to determine whether it is partnership property or not, and the matter could not be there litigated, especially as the Bankruptcy Act has given exclusive jurisdiction over the controversy to the state Courts in a plenary suit. The referee's assumed "paramount jurisdiction of the bankruptcy Court," to determine the question (R. 33, 34, 37) does not and never did exist, where the claim that the property is partnership property is not merely colorable, but as here, is real, substantial and *bona fide.*

IV.

CONCLUSION.

It is respectfully submitted that for the reasons in this brief given and upon the authorities cited, the order and decree appealed from should be reversed with direction to the District Court to annul the

order of the referee for delivery of the boat to the trustee.

Dated, San Francisco,
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